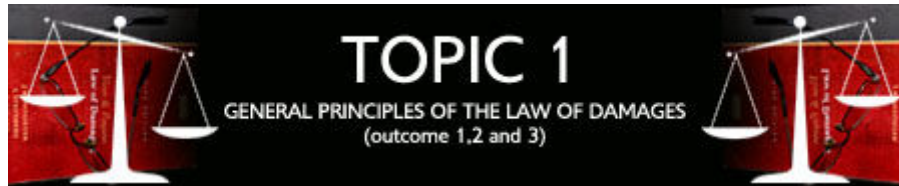


Learning Unit 1 TOPIC 1: GENERAL PRINCIPLES OF THE LAW OF DAMAGES

Definitions and terminology



TOPIC 1: GENERAL PRINCIPLES OF THE LAW OF DAMAGES

Learning Unit 1

1.1 Definitions and terminology



Par 1.1, 1.2

Summary

The law of damages is that part of the law which indicates how the existence and extent of damage as well as the proper amount of damages or satisfaction are to be determined in the case of delict, breach of contract and other legal principles providing for the payment of damages. The law of damages consists of principles regarding the compensation of all forms of damage from all sources of claims for damages and satisfaction.



Par 1.7



Par 2.1-2.7

Summary

Damage is defined as the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognized needs of the person involved. In the definition of "damage" five elements of the concept of damage are revealed:

(1) Element of diminution or reduction – in the case of diminution of a patrimonial interest it is generally measured by a monetary standard (quantitative reduction), whereas in the case of a reduction in a personality interest there is mainly a reduction in quality.

(2) Causal element – a damage-causing event, which is a factual situation of an uncertain nature, must have taken place to cause the damage.

(3) Interest element – it is either a patrimonial interest or a personality interest which has been reduced. We follow the wide concept of damage which includes both patrimonial and non-patrimonial loss.

(4) Normative element – legal norms (and not only factual circumstances) co-determine the existence and nature of damage. The presence of legal norms is represented by the words “legally recognized needs” .

(5) Time element – both reductions that has already taken place at the time of trial, as well as one’s that is expected with a sufficient degree of probability to materialize in the future, are taken into account.

Damage is an ancient legal term and the word *damnum* enter into legal terminology with the *lex Aquilia* in 287 BC. Since then it has developed into a complex concept involving numerous principles.

The origin and nature of the modern concept of patrimonial damage can be traced back to the German jurist Mommsen in 1855. According to him damage (*interesse*) is the difference between the present patrimony of the plaintiff and the patrimonial position which would presently have existed if the damage-causing event had not taken place. This approach (also called the *sum-formula*) was taken over as the concept of damage in our law. However, this is not really a satisfactory definition of damage but rather a comparative method by which the extent of patrimonial loss may be assessed. The modern concept of damage has developed in the context of delictual and contractual liability.

See *De Vos v SA Eagle Versekeringsmaatskappy Bpk* 1985 (3) SA 447 (A) as discussed in chapter 2, fn 32 on what constitutes damage.

Our law also accepts a wide concept of damage which includes both patrimonial and non-patrimonial loss. Since in a primary sense damage means patrimonial loss, some authors define damage only in terms of a reduction of someone’s patrimony. Other authors regard damage as a wide concept which comprises both pecuniary (patrimonial) and non-pecuniary (non-patrimonial) loss. Three arguments can be advanced to prove that the wide concept of damage is the correct approach: Firstly, patrimonial and non-patrimonial loss has a common denominator, namely the diminution in the utility or quality of any legally protected interest (patrimonial or personality). Secondly, legal practice employs the wide concept of damage – the term “damage” or “loss”, if not defined in legislation, is interpreted in legal practice to include both patrimonial and non-patrimonial loss. Thirdly, the action for pain and suffering provides imperfect compensation for the infringement of physical-mental integrity (personality interest) and has developed in conjunction with the Aquilian action as a remedy aimed at compensation for patrimonial loss after bodily injuries. The recognition of both these remedies illustrates the acceptance of the wide concept of damage.

The common factor between patrimonial and non-patrimonial loss is that in both the utility or quality of a legally protected interest is infringed (ie the plaintiff loses something for which he or she may receive money as compensation). There are also important differences between patrimonial and non-patrimonial loss: Firstly, patrimonial loss can be directly measured in money, while non-patrimonial loss is only indirectly measurable in this way. Secondly, the extent of patrimonial loss can be determined with greater precision (ie market value, reasonable cost of repairs) than the extent of non-patrimonial loss (subjectively experienced and assessed by means of an equitable estimate). Thirdly, damages for patrimonial loss (in the form of money) is a true equivalent for the financial loss suffered, whereas in the case of non-patrimonial loss there is no real relationship between the money received in the form of satisfaction and the injury to personality. Fourthly, in patrimonial loss the utility of a patrimonial interest is impaired, whilst in non-patrimonial loss it is the quality of a personality interest that is reduced.

Although wrongfulness and damage are two separate requirements for delictual liability, they stand in a particular relationship to each other. To illustrate this we will supply a few examples. Conduct can be described as wrongful only if it has caused a harmful consequence. If X drives at 200km/h in an urban area but causes no accident, her conduct is not wrongful for purposes of private law. It is also possible to act wrongfully without causing harm, eg when A is on B’s land without a lawful reason but causes no harm. There can also be damage without any wrongful act, eg when lightning (*vis maior*) causes harm.

The law denies compensation where bodily injuries prevent someone from earning money illegally. Both damage and wrongfulness are absent – a person who earns money through unlawful activities does not use his or her earning capacity as part of his or her legal patrimony and consequently the frustration of such activities cannot constitute damage. If the injured person can prove that he or she also has the capacity to

earn money lawfully, they can claim for the impaired potential to have earned income lawfully in future. The same applies to the claim for loss of support where the breadwinner earned illegally – the value of the dependant's right to support will be proved by evidence of how the breadwinner could have earned income lawfully.

Damage has a specific relationship with time and therefore we distinguish between past loss and future or prospective loss (par 6.2).



Par 3.1-3.3

Summary

Patrimonial loss is the *diminution in the utility of a patrimonial interest in satisfying the legally recognized needs of the person entitled to such interest*. It is also defined as *the loss or reduction in value of a positive asset in someone's patrimony or the creation or increase of a negative element of his or her patrimony (a patrimonial debt)*.

The **nature of a patrimony** can be explained in different ways. In our early case law (*Union Government v Warneke* 1911 AD 657; *Oslo Land v Union Government* 1938 AD 584) patrimony is defined as a universitas of rights and duties. This definition reflects the so-called **juridical concept of patrimony**. A point of criticism against this definition is whether rights are in fact part of a patrimony and whether the objects of such rights should not rather qualify as patrimonial elements. It is also asked whether obligations (debts) can be said to form part of someone's patrimony. These points of criticism do not imply that the traditional concept of patrimony is unusable, but merely that adaptations are required. The juridical concept of patrimony is the one which is the most compatible with legal practice and which should therefore be accepted and theoretically developed.

A legally recognized relationship is required between a person and an object or interest before the person may suffer damage in respect of it. Thus, X is generally not affected by damage caused to Y's property. The juridical concept of patrimony is intended to identify the interests that may be **elements** of someone's patrimony.

The patrimony of a person consists of **positive and negative elements** which constitute his or her total patrimony or estate. However, patrimony does not merely concern rights, obligations and expectancies as such, it concerns their monetary value because patrimonial loss must necessarily be expressed in money.

Positive elements (assets) of someone's patrimony (estate)

(a) Patrimonial rights

The following are patrimonial rights: real rights, immaterial property rights, personal rights, personal immaterial property rights to earning capacity and creditworthiness and the personal right not to be misled. The objects of patrimonial rights do not form part of someone's patrimony, although the reduction in their utility may constitute damage, since it causes a reduction in the value of such rights.

(b) Expectations (spes) of patrimonial rights or benefits

The legally recognized expectation of a person to acquire patrimonial rights or benefits in future. The possibility of making a profit may be recognized as an expectancy worthy of protection. For example: X's horse has a chance of one in three of winning a race and earning prize money. Y injures the horse negligently and thus frustrates X's expectation to receive the winning. X should be able to recover a third of the prize money. Normally an expectation has a present element (some or other factual basis) as well as a future element (the probabilities in connection with the full realization of the spes).

Examples of expectations of patrimonial rights or benefits: expectation that a person has to earn income in future by using his or her abilities, a contractual right to performance and a spes successionis (expectation to an inheritance).



Chapter 3 ¶ 61

Pretorius v McCallum 2002 (2) SA 423 (C); **Ries v Boland Bank** PKS 2000 (4) SA 955 (C); **BOE Bank v Ries** 2002 (2) SA 39 (SCA)

An expectation must meet certain **general requirements** before it can be said to form part of someone's estate or patrimony: (1) the law must in principle recognize the type of expectation as worthy of protection; (2) there must be a sufficient degree of probability or possibility that the expectation would be realized; (3) the expectation must have a monetary value; (4) the expectation must not contain an illegal element.

Negative elements of patrimony (estate)

(a) Patrimonial debts (expenses)

The creation of a debt may constitute damage even if the debtor has no assets in his or her estate to satisfy such debt. Debts are considered to be independent patrimonial elements with their own positive value, which means the greater the debt, the smaller the value of the patrimony. Someone's patrimony is burdened or reduced by the creation, acceleration or increase of a debt or liability.

(b) Expectations of patrimonial debts

A damage-causing event may have the result that a probability is created that a person has to incur future expenses, eg future medical expenses after an accident. As long as the anticipated debt or expense is the reasonable result of the damage-causing event, it constitutes damage even if it has not yet been incurred. When the debt is actually incurred, the expectation of a debt becomes a negative patrimonial element.

Ways in which patrimonial damage may be caused

There are basically four ways in which patrimonial damage may be caused: (1) loss of a patrimonial element (someone's property is stolen); (2) reduction in value of patrimonial element (damage to property); (3) creation or increase of a debt (expense) and delay in receiving benefits (medical expenses); and (4) creation or acceleration of expectation of a debt (future medical expenses).



Par 3.4-3.5



Par 5.1-5.4

Summary

Non-patrimonial loss is the diminution, as the result of a damage-causing event, in the quality of the highly personal (or personality) interests of an individual in satisfying his or her legally recognized needs, but which does not affect his or her patrimony. Non-patrimonial loss is defined with reference to highly personal or personality interests. The different **rights of personality** give an indication of the relevant personality interests and determine the nature and extent of non-patrimonial loss (injury to personality). Our law recognizes personality rights to physical and mental integrity (corpus), reputation, dignity, feelings, privacy and identity. The interests covered by these rights may be referred to as a **legally recognized 'non-patrimony'**. The following **interests** form part of such a highly personal 'non-patrimony': freedom from pain, emotional shock, psychological diseases, psychiatric injury and physical suffering; the ability to enjoy the ordinary as well as the particular amenities of life; the aesthetic interest in having a body which is not disfigured; the ability to live for the full duration of one's normally expected lifespan; freedom from any physical infringement of one's body; one's good reputation in the eyes of the community; one's non-violated feelings of dignity, chastity, piety and religion; the interest in the consortium of a spouse; and the maintenance of one's privacy and identity. If one of these highly personal interests is interfered with, the individual suffers from an infringement of a personality right which could result in non-patrimonial loss.

One should also recognize that in a physical violation of the body (highly personal interest) both non-patrimonial and patrimonial interests are infringed in that the injured person experiences pain and suffering (non-patrimonial loss) and also incurs medical expenses or has the expectation of incurring such expenses (patrimonial loss).



Par 6.1-6.5

Summary

Prospective damage is *damage in the form of patrimonial and non-patrimonial loss which will, with a sufficient degree of probability or possibility, materialize after the date of assessment of damage resulting from an earlier damage-causing event.* Take note of the difference between **prospective damage and lucrum cessans**. The latter is seen as lost profit or lost income, whereas prospective loss also includes future expenses, which is not part of lucrum cessans. On the other hand, past loss of profit cannot be prospective loss, but it is classified as past lucrum cessans. The reason for classifying it as lucrum cessans is because the assessment is done with the aid of probabilities and hypotheses. Therefore not all prospective damage amounts to lucrum cessans and not all lucrum cessans can be described as prospective loss.

When analysing the **nature of prospective damage** it is important to remember that prospective damage may take the form of prospective patrimonial loss as well as prospective non-patrimonial loss. Damage is **relative to time** and therefore it can be subdivided into, for example, damage before the accrual of a cause of action, damage from the moment of liability to the commencement of the action, damage from the commencement of the action up to the time of judgment, damage up to the stage of an appeal and damage beyond this date. Damage is thus not always a past fact, it will depend from which moment it is assessed. In addition to any diminution of utility or quality which has already taken place (past loss), a further reduction may often be expected in future (future loss). The **degree of probability or possibility** with which this reduction is to be expected, must be a reasonable possibility. Apparently, a possibility of less than 10 per cent will not be reasonable.

Activity 1

Reinecke (1988 *De Jure* 236) argues that loss of earning capacity (loss of future income) does not constitute prospective loss, since nothing happens in future which completes the damage.

Think about this statement and make up your own opinion on the correctness of his statement. Make a list of reasons or arguments why you will agree or disagree with him. Once you have done that, you can read further.

Feedback on Activity

Before we can evaluate the correctness of his statement, we need to understand that prospective loss rests on two legs; it has a prospective element or dimension as well as a present one. This implies that prospective loss is not merely something which will happen in future if one looks into the future from the moment of assessment of damage, since it may also be seen as the present impairment of an expectation of something in future. Study again the discussion on expectations as an example of a positive element of someone's patrimony discussed above. There we indicated that an expectation has a present element as well as a future element. In other words, prospective loss as the frustration of a future expectancy is co-determined by how his or her present interests are affected by a damage-causing event. Even though prospective loss is literally damage which will only manifest itself in money or otherwise fully in future, its basis is to be found in the impairment of the plaintiff's present interests.

Boberg (*Delict* 487) is of the opinion that damages cannot literally be assessed as at the date of the wrong. The plaintiff's loss depends on what happens to him or her *after* the wrong has been committed. The economic sequelae (consequences) of, for example, bodily injuries can only be determined with regard to the plaintiff's subsequent treatment by his doctors and his employers. In an infringement of earning capacity, such as in Reinecke's example, it is only the damage-causing event which is completed. Probable future events which co-determine the content of the expectancy must also be considered. The financial position of the plaintiff will in future be affected whenever he or she does not receive the expected income (see fn 20, chapter 6). Our law recognises this fact by taking into account future contingencies and discounting future loss to the date of trial.

One can therefore conclude that Reinecke's theory depends too much on the present manifestation of future damage, whereas our practice attaches too much importance to the prospective leg of such loss and in this process fails to appreciate the true nature of prospective damage.

Prospective loss is assessed *through a comparison of the hypothetical course of events before and after a damage-causing event*. The hypothetical position (expectation) *before* the damage-causing event has become unreal and this must be compared with the hypothetical position *after* the damage-causing event which has become real. The new expectation or hypothesis caused by the damage-causing event must be compared with the expectation or hypothesis existing before the damage-causing event. Future damage is thus the difference between the present values of these two expectations. The whole process of the determination of future damage also involves causation (between the hypothetical facts) since causation and assessment of loss are inseparably linked.

Five **forms of prospective patrimonial loss** are recognized in practice:

- (1) Future expenses on account of a damage-causing event, such as future medical expenses.
- (2) Loss of future income.
- (3) Loss of business, contractual or professional profit.
- (4) Loss of prospective support.
- (5) Loss of a chance, for example where a horse with a one in three chance of winning a race and earning prize money for its owner is negligently injured.



Par 8.4

Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A) 774-777



Par 8.1-8.2

Summary

Damages are defined as *the monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage*. Damages must be paid in money, but it doesn't have to be in a single lump sum since damages may also take the form of instalments or periodic payments, as well as interim payments. These exceptions are found in sections 17(4) and 17(6) of the Road Accident Fund Act 56 of 1996 and section 47(4) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. Damages are awarded for both patrimonial and non-patrimonial loss. The primary object of damages (see sect 1.5) is to neutralize loss through the addition of a new patrimonial element, such as an undertaking by the Road Accident Fund to pay medical expenses as incurred.

Damages as remedy may be supplemented or replaced by a claim for **restitution in kind** of the interests of the plaintiff as they were before the damage-causing event. Examples of restitution in kind are the eviction of a lessee, the delivery of property or the release of a person. Damages are the primary remedy for loss already suffered and restitution in kind should not be the point of departure. However, through an award of damages the law seeks to attain the financial equivalent of restitution in kind. In the case of breach of contract one could argue that a claim for specific performance is a claim for restitution in kind. In delictual liability an order for restitution in kind may generally not be given and compensation will mostly take the form of an award of damages.

Damages must be **expressed in money**. When damages are calculated in a foreign currency, the amount should be converted to South African rands, but it may also be paid in that foreign currency. The conversion to rands should be done when payment is made. See *Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A) 774-777*.

The principle of **nominalism** is applicable in regard to the payment of an amount of damages. This principle entails that the amount of damages may not be adjusted for inflation after it has been determined. The plaintiff may, however, claim mora interest to counter the negative effects of inflation. See the discussion in sect 1.8 on mora interest.



Par 9.1-9.3

Summary

In patrimonial loss the affected interests are **directly measurable in money**. Damages in the form of money therefore provide a true equivalent of such loss and in that sense effects financial restitution. The damages awarded should place the plaintiff in the position he or she would have occupied but for the damage-causing event, but the law does not take the plaintiff's emotions into account.

Reparation or indemnification of non-patrimonial loss is possible in terms of the actio iniuriarum, the action for pain and suffering, the actio de pauperie and certain statutory remedies (see sect 1.3). In non-patrimonial loss the affected interests do not have a direct monetary value and cannot be 'naturally' expressed as a sum of money. This implies that monetary compensation for non-patrimonial loss cannot literally place the plaintiff in the position he or she would have been in had the damage-causing event not occurred. In Topic 4 the assessment of non-patrimonial loss will be discussed in detail.



Par 14.2

ASSIGNMENT 1 (Unique number 266003) - due date 22/07/2013

Study the definitions of the following concepts. Compare the individual concepts in each pair by stating their main characteristic and identify the most prominent similarity and/or most prominent difference between the two concepts as applied in the law of delict and the law of contract:

- (i) damage and damages;
- (ii) patrimonial and non-patrimonial loss; and
- (iii) general and special damage. (10 marks)

You have to answer this assignment within the table provided under "Additional Resources".

An assignment submitted in any other format will not be marked.

We apologise for being so prescriptive on the method of submission, but this will expedite the marking of the assignments, which is in the best interests of all parties concerned.

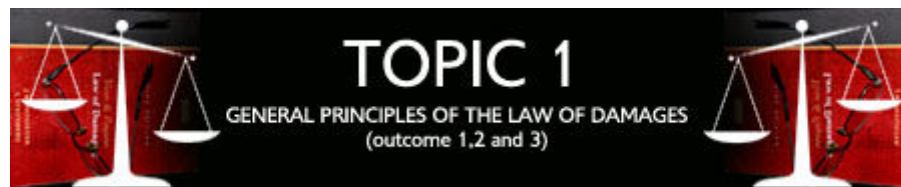
ASSESSMENT CRITERIA FOR ASSIGNMENT 1

Excellent (9 - 10)	Good understanding (8.5 – 5.5)	Needs further attention (5 – 2.5)	Not enough understanding (0.5 - 2)
Stated main characteristic of each	Stated main characteristic of each	Supplied definitions, but did not identify main	Supplied only a definition, but did not

and identified the most prominent similarity and difference in all instances. Applied to contract and delict.	and identified the most prominent similarity and difference. No application.	characteristic; or identified main characteristic, but did not compare the two concepts in all instances.	compare two concepts in all instances.
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Who may claim and who has to pay?



Learning Unit 1

1.2 Who may claim and who has to pay?



Par 11.1

Par 11.2 and fn 3, 27, 40, 41, 43, 48, 113, 130

Road Accident Fund v Mtati 2005 (6) SA 215 (SCA)

Guardian National Ins Co Ltd v Van Gool 1992 (4) SA 61 (A)

Santam Bpk v Henery 1999 (3) SA 421 (A)

Amod v Multilateral Motor Vehicle Accidents Fund 1999 (4) SA 1319 (SCA)

Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA)

Volks v Robinson 2005 (5) BCLR 446 (CC)

Nodada Funeral Services CC v The Master 2003 (4) SA 422 (Tkh)

Van der Merwe v RAF 2006 (4) SA 230 (CC)

Robinson 2007 (3) PELJ 70 (a copy is available in "Additional Resources")

